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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 108

AARON BORIN, D/B/A WICHITA PACKING COMPANY,
Petitioner

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable, the Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States.

Comes now the petitioner, Aaron Borin, doing business as Wichita Packing Company, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 5, 1954.

OPINIONS BELOW

The order of the District Court (R. 102) dismissing the complaint of the United States of America is unreported. The opinion of the Court of Appeals for the Fifth Circuit (R. 107-115) is reported at 209 F. 2d 145.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1954. Thereafter an enlargement of time was granted by the Court of Appeals for the filing of a petition for rehearing (R. 114). On March 8, 1954, the Court of Appeals entered an order denying the petition for rehearing (R. 143). The jurisdiction of this Court is invoked under 28 USC Sec. 1254 (1).

QUESTION PRESENTED

In establishing the livestock slaughter subsidy program pursuant to Section 2(e) of the Emergency Price Control Act of 1942, as amended, Congress provided that it should be administered "only" by the Reconstruction Finance Corporation (or by some other corporation created pursuant to the Reconstruction Finance Corporation Act). All these corporations have the authority to sue and be sued. The question presented is:

May the defense of a state statute of limitations be asserted in an action brought in the name of the United States of America for the recovery of subsidy payments made by the Reconstruction Finance Corporation in administering that program?

STATUTE INVOLVED

Section 2(e) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 50 USC App. Sec. 902e, provided that the Price Administrator might determine to buy or sell commodities or pay subsidies in order to achieve maximum production of those commodities. However, as to those commodities defined as strategic or critical pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, including livestock and meat, the Federal Loan Administrator, with the approval of the President, was authorized to make such determinations. When such determination is made by the Federal Loan Administrator with the approval of the President, the statute provided

that subsidies for such commodities were to be paid *only* by a corporation created or organized pursuant to Section 5(d) of the Reconstruction Finance Corporation Act.

The relevant portion of Section 2(e) of the Emergency Price Control Act of 1942, as amended, follows:

> "Provided, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determination shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, *only* by corporations created or organized pursuant to such section 5d; . . ." (emphasis supplied)

STATEMENT

Petitioner is a beef slaughterer who, from 1943 to 1946 applied for and received payments from RFC under the livestock subsidy program established by Sec. 2(e) of the Emergency Price Control Act of 1942. The Act provided specifically that this program was to be administered "only" by the RFC or a similarly organized corporation. The program was administered first by the Defense Supplies Corporation and later by RFC. All of the petitioner's dealings were with these corporations. None was with the United States of America or with any other agency thereof.

In February 1953 this action was instituted, in the name of the United States, in the United States District Court for the Northern District of Texas, praying that court to declare that petitioner had violated an Office of Price Administration meat regulation during the period from June 1, 1943 to June 30, 1946, and for that reason to award respondent a money judgment for the amount of the live-

stock subsidy payments made to petitioner by the RFC during that period. The complaint was drawn in the language of the False Claims Act (R.S. 3490-3494, 31 USC Sec. 231 et seq.) and penalties and interest were prayed for in accordance with the provisions of that Act.

The gravamen of the complaint was that petitioner, in applying for the subsidy payments, had falsely certified to RFC during the period 1943-1946 that he was not in violation of meat regulations of the OPA. No allegation was made that petitioner had in any way appropriated subsidy monies for himself or that he had paid his livestock producers, the ultimate beneficiaries of the subsidy program, less than he claimed to have paid them.

The complaint was filed in the name of the United States although under the Price Control Act the RFC was made the exclusive administrator of the program and could have brought suit in its own name. The bulk of the record in this case consists of the voluminous regulations issued by the RFC to effectuate the purposes of the Act. No explanation was given for the long delay in asserting the claim or for the use of the name of the United States of America as plaintiff.

Petitioner moved to dismiss the complaint (R. 95) on the ground, here relevant, that the acts complained of occurred more than two years prior to the filing of the complaint and the action was therefore barred by the Texas Statute of Limitations.[1] The motion was granted (R. 102). The Court of Appeals reversed. It held that while the United States was barred by the six year limita-

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[1] Vernon's Texas Civil Statutes, Article 5526. "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

"4. . . . Actions for debt where the indebtedness is not evidenced by a contract in writing."

Under the law of Texas this section is applicable to a claim for common law deceit. *Quinn* v. *Press*, 135 Tex. 60, 140 S.W. 2d 438.

tion imposed by the False Claims Act (31 USC Sec. 235), it had pleaded sufficiently to sustain an action for restitution or common law fraud and that, because of its sovereign immunity, no state statute of limitations was applicable against the United States.

REASONS FOR GRANTING THE WRIT

As will be shown, the decision of the court below is in conflict with decisions of this Court and with decisions of the Courts of Appeals of the Third, Sixth and Tenth Circuits.

Section 2(e) of the Emergency Price Control Act delegates the subsidy program exclusively to the RFC or a similarly organized corporation. The record here presents squarely the issue whether, in an action brought to recapture monies paid under the program, a state statute of limitations is available as a defense. This was the issue raised by the motion to dismiss (R. 95).

There can be no doubt that if an action for restitution or for common law fraud (which the court below says the respondent is here asserting) were brought by a private individual, the statute of limitations would operate as a bar. It is only by reason of the doctrine of sovereign immunities that petitioner has been precluded from asserting that defense by the court below.

Whether the statute of limitations may operate as a bar must depend on an analysis of the applicable statutes (Section 2(e) Emergency Price Control Act and Reconstruction Finance Corporation Act) in the light of the prior decisions of this Court. The apparently arbitrary decision of the Attorney General to bring the action in the name of the United States, as was done here, rather than in the name of the Reconstruction Finance Corporation, as was done in *RFC* v. *Menihan Corp.*, 312 U.S. 81, cannot change the result.

The issue remains whether Congress intended the program to be administered outside the cloak of sovereign

immunities so that a state statute of limitations may be interposed.

This issue has never been decided by this Court.[2] However, in three relatively recent cases decided by this Court, certain principles have been enunciated which petitioner urges are dispositive of the issue here but which have not been adhered to by the court below.[3]

In the series of cases cited above, this Court has recognized that corporate instrumentalities of the government may be endowed by Congress with the government's immunities. However, the question is each time asked, "Has it done so?" In determining the answer to that question this Court holds that Congress will be presumed not to have endowed the corporation with immunities unless they are clearly granted. Congress intended that the government corporation be amenable to law.[4]

In arriving at its decision, the court below considered neither the applicable statutes nor the controlling decisions of this Court. Rather, it adopts the principle that a court should determine, without reference to statutory criteria, whether the corporation is performing a governmental function. If it is found (as the court did here) that the function is governmental, then, for purposes of litigation, the corporate instrumentality is to be treated as though it were an executive agency of the government.

To grant or deny a government corporation the mantle of sovereign immunities on the basis of such a test negates the authority of this Court in this important area.

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[2] But see *Bank of United States* v. *Donally*, 8 Pet. 361, which was decided on a conflict of laws question, i.e., whether the statute of limitations of Virginia or Kentucky applied as a bar. The question whether the Bank was entitled to the government's immunity was not discussed.

See also, Coffman, *Legal Status of Government Corporations*, 7 Fed. Bar Journ. 389, 401, 402.

[3] *Keifer & Keifer* v. *RFC*, 306 U.S. 381; *FHA* v. *Burr*, 309 U.S. 242; *RFC* v. *Menihan Corp.*, 312 U.S. 81.

[4] *Keifer & Keifer* v. *RFC*, *supra*, at pages 390, 391.

In two of the cases cited above, this Court had before it the Reconstruction Finance Corporation Act (the relevant portions are set forth in Appendix A) to determine whether that corporation was subject to suit or to an incident of suit, i.e., the assessment against the corporation of costs and allowances.[5] In both cases the decision was adverse to the corporation.

The Court considered the three cases because of the public importance of the issue in view of the increasing use by Congress of the corporate device. Petitioner respectfully suggests that the present case should be considered for the same reasons which impelled the Court to decide those cases.

Unless this Court decides the issue presented here, the decision below will stand as substantial authority for a proposition completely at variance with the principles established by a long line of cases culminating in *Keifer, Burr* and ***Menihan, supra.***

1. In establishing the subsidy program Congress did not endow the RFC with any of the government's immunities.

It has long been established that it is the doctrine of sovereign immunities which precludes the assertion of a statute of limitations against the government (*Gibson* v. *Chouteau*, 13 Wall. 92). The basis for immunity from the bar of a statute of limitations is identical with the basis for immunity from unconsented suit. To determine whether RFC, in the subsidy program, was endowed with immunities to protect it from a statute of limitations, the

[5] The Reconstruction Finance Corporation Act, as amended, is set forth in Appendix A. It is to be noted that, subsequent to *Menihan*, Congress granted several specific immunities to the corporation. It granted the government's immunity against costs and allowances (the issue in *Menihan*) and certain limited priorities in claims against debtor's estates. By endowing the corporation with these enumerated immunities only, it would appear clear that Congress intended the corporation to possess none other.

statute establishing that program must be construed. That analysis should be made within the purview of the criteria established by this Court, as indicated above, and "in line with the current disfavor of the doctrine of governmental immunity."[6]

Section 2(e) of the Emergency Price Control Act, which delegated *exclusive* authority to RFC, attempts to achieve maximum production of certain commodities considered essential to the war effort. It provided for a system of subsidies to accomplish this end. These subsidies were not gratuities but, in the area of livestock production, were made to compensate slaughterers who paid prices for livestock disproportionate to the lower fixed price allowed them on the sale of meat. (See *Illinois Packing Co.* v. *Bowles*, Emerg. Ct. App., 147 F. 2d 554; *Armour & Co.* v. *RFC*, Emerg. Ct. App., 162 F. 2d 918). It is estimated that RFC expended one and one-half billion dollars to effectuate the purposes of the Act.

At the time of the enactment of the Emergency Price Control Act, Congress was, of course, cognizant of the decisions of this Court in *Keifer, Burr* and *Menihan, supra.* When Congress determined that RFC alone should administer the program it had the alternative of designating an agency of the government which would

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[6] Chief Justice Hughes, writing for the Court in *Menihan*, said:

> "Starting from the premise indicated in the Keifer Case that waivers by Congress of governmental immunity from suit should be liberally construed in the case of federal instrumentalities—that being in line with the current disfavor of the doctrine of governmental immunity—we concluded that in the absence of a contrary showing 'it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.' Following that reasoning, the precise point of the decision was that the words 'sue and be sued' normally embrace all civil process incident to the commencement or continuance of legal proceedings and hence embraced garnishment as part of that process." *RFC* v. *Menihan, supra,* at pages 84, 85.

operate with the protection of sovereign immunity. Were this the intention, the selection of the Department of Agriculture would have been logical. (See *U.S. Dep't of Agriculture* v. *Remund,* 330 U.S. 539).

However, instead of employing an executive agency of the government to carry out its mandate, Congress chose an established corporate agent and directed that the corporation have exclusive authority to administer the program. If Congress desired the corporate agent to operate as though it were an executive agency of the government, it could have so directed. It did not. Under these circumstances, where Congressional intent is made clear, it is not for the courts to treat the corporation as though Congress had, instead, designated an executive agency.

Recently the question whether RFC, as administrator of the meat subsidy program, was clothed with governmental immunity was decided by the Third Circuit.[7] The opinion was written by Judge Maris, who, because of his position as Presiding Judge of the Emergency Court of Appeals, has had long, specialized experience in this field.

In that case, suit was brought against RFC for illegally withheld meat subsidies. The government argued as they do here, that because of the function served by RFC it was in the position of an executive agency of the United States and, therefore, immune from suit. The court, following the reasoning of *Menihan,* construed the applicable statutes to determine the intent of Congress. It found that Congress intended that the program be operated *exclusively* by the RFC and that it was the further intent of Congress that RFC should administer that program without the protection of governmental immunity. The government did not choose to petition this Court for a review of that decision.

The court below endows the corporation with an immunity which Congress did not intend. It imputes to

[7] *Riverview Packing Co.* v. *RFC,* 207 F. 2d 361 (1953).

Congress idiosyncratic and capricious conduct. Such an imputation has been proscribed by this Court.[8]

2. Importance of the issue.

The issue presented here is by no means limited to the statutes or to the facts involved in this case. It cuts across the entire field of government corporations. The corporate device continues and undoubtedly will continue to be employed by Congress. When Mr. Justice Frankfurter wrote the opinion in *Keifer* (1938), he noted forty such agencies. The last compilation (1950) shows forty-two (Government Corporation Control Act, 31 USC Sec. 846). The very fact that Congress felt it desirable in this Act to regulate the fiscal operations of government corporations is an indication of the permanency of the use of that device.

Recently the Attorney General has instituted a number of actions against beef slaughterers to recover subsidy monies paid them during the period 1943-1946. The latest of such suits was filed on April 28, 1954 in the United States District Court for the Southern District of California, Central Division. The suit is entitled, "United States of America v. Union Packing Co., *et al.*" (Civil No. 16729-WB). The complaint in this suit follows the theory of the complaint in the case at bar and prays for damages amounting to more than five million dollars including interest. The government apparently contemplates a number of similar suits. Because of the passage of many years since these subsidy monies were paid the defense of these suits is made extraordinarily difficult. Records have been destroyed in the ordinary course of business. Witnesses have dispersed or died. All of the weighty policy reasons lying behind the doctrine that there shall be an end to litigation apply with particular force in these lawsuits which, for no stated reason, have waited so long to be instituted. The government has for many years had

[8] *Keifer & Keifer* v. *RFC*, *supra*, at pages 393, 394.

knowledge of the basic facts upon which it will rely in order to prove the allegations of the complaints in these cases (R. 97-101).

Increasingly, the business community is compelled to deal with government corporations as distinguished from executive agencies of government. The assurance of this Court should be given the businessman that, many years after concluding a transaction with what he believes is an ordinary business entity like himself, he will not be confronted with an awesome sovereign against whom, for reasons buried in history, he may not assert a time bar.

3. The nominal party plaintiff.

Presumably the government feels that in instituting actions on behalf of a government corporation, the name of the plaintiff may at one time be "United States of America" and at another, the name of the corporation. There is no apparent rationale behind the choice in a particular case.[9] However, as in this case, the Attorney General apparently thinks that by using the name "United States of America" he is acquiring rights otherwise denied him if he entitled the matter "Reconstruction Finance Corporation, plaintiff." (cf. *RFC* v. *Foster Wheeler Corp.*, 70 F. Supp. 420 (S.D. Texas, 1947)). It is inconceivable that by merely shifting the names, the rights of the parties, fixed as they are by statute, can be changed. It cannot be argued, for example, that the result in *Menihan* would have been different if the name of the plaintiff had been changed to "United States." No "ritualistic formula" (*Keifer, supra*, at p. 389) can turn on or off the flow of sovereign immunities.[10]

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[9] Several District Court cases have been brought to recover monies paid by RFC. The name of the party plaintiff varies, e.g., *RFC* v. *McCarthy Bros.*, 117 F. Supp. 345 (1953) (N.D. Cal.); *RFC* v. *Foster-Wheeler Corp.*, 70 F. Supp. 420 (1947) (S.D. Tex.); the case at bar entitled *"United States of America*, plaintiff."

[10] See Coffman, op. cit., at p. 403.

Nor can a finding by a court that, in the particular circumstances, the corporate agent is fulfilling a governmental function be the basis for endowing the corporation with immunities. This reasoning involves a basic misconception of the relation of the government corporation to the government. In the sense that it does the government's work, every government corporation is the "government." The government is no "brooding omnipresence in the sky." It must operate through its agents. (See *Walder* v. *United States,* , U.S. , 98 L. ed. 278, 279, 280, where the Court says ". . . in the only way in which the government can do anything, namely, through its agents . . .") The question is what status has been conferred by Congress on those agents.

CONFLICTS

The precise issue presented here has never been decided by this Court. Nor has this issue been decided by the various Courts of Appeals with the exception of the court below.

Serious conflicts do exist among the Circuits in basic principle. Similarly, as has been shown, the decision below is in conflict with the decisions of this Court. If the decision below is allowed to stand, the principles enunciated by this Court in *Keifer, Burr* and *Menihan, supra,* will be seriously eroded. This Court has declared the doctrine of governmental immunity to be in disfavor and has limited strictly its application to government corporations; the decision below provides authority for the resurgence of this doctrine.

As shown above, the guiding principles most recently adopted by this Court in dealing with immunities attaching to corporate instrumentalities of the government are:

1. The doctrine of governmental immunity is in disfavor.

2. ". . . waivers by Congress of governmental immunities should be liberally construed in the case of federal instrumentalities . . ." *Menihan, supra,* 312 U.S. 81, 84, 85.

and, therefore

3. Unless Congress affirmatively endows a corporate instrumentality with the immunities of the government, it will be presumed that they are waived.

The court below did not apply these canons; it did not, apparently, even consider the pertinent decisions of this Court. Rather, it based its determination solely on its own evaluation of the nature of the function the corporation was performing. Because "The funds were Government funds and the loss was the Government's loss", the court held that RFC and DSC were "*mere* agencies of the Government to accomplish purely Governmental purposes" (emphasis supplied) (R. 112); and it concluded, on this theory, that since the corporation was doing the work of the government, it was entitled to the immunity of the sovereign against the assertion of time bars. It decided the case as though Congress had chosen the alternative, which it did not, of delegating the program to an executive agency.

In *Keifer, supra,* at p. 388, however, this Court said, "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work", clearly recognizing that, since all governmental corporations are agents created by Congress to do the government's work, this cannot be a valid distinguishing factor.

In like manner, the decision below conflicts with the decision of the Third Circuit in *Riverview Packing Co.* v. *RFC, supra.* The function served by the corporation in that case was identical with that in the case at bar. The Third Circuit also noted that the funds sought to be recovered were government funds (*Riverview, supra,* at p. 366). Yet that court, after construing the statute in the

light of *Menihan,* held that governmental immunities had been waived by Congress.[11]

The decision below conflicts, also, with that of the Sixth Circuit in *RFC* v. *Langham* (1953) 208 F. 2d 556. There the court held that RFC was shorn of the protection of governmental immunities. The decision was based on the authority of *Menihan, supra.*

To the same effect see *RFC* v. *Breeding,* 211 F. 2d 385 (1954), where the Court of Appeals for the Tenth Circuit held that RFC was subject to an Oklahoma statute providing for the time in which to enter deficiency judgments.[12]

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[11] At 207 F. 2d 367 the court said:

"The question of jurisdiction, therefore, comes down to whether Congress by section 2(e) of the Emergency Price Control Act intended to endow its corporate subsidy paying agents with governmental immunity from suit or whether on the contrary it intended that their corporate capacity to be sued should extend to their subsidy paying activities. This is a question of legislative intent which we must resolve since Congress did not deal with it expressly.[13] We think that there are sufficient indications that the latter was the Congressional intent. By section 2(e) Congress directed that subsidies should not be paid by Government officers, to whom immunity would apply, but exclusively by certain Government corporations which, as we have seen, were expressly authorized to be sued.

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[13] Federal Land Bank v. Priddy, 1935, 295 U.S. 229, 231; Keifer & Keifer v. R.F.C., 1939, 306 U.S. 381, 389."

[12] At pp. 389 and 390 the court said:

"The Finance Corporation is a corporation created by Act of Congress. All of its stock is owned by the United States. It is a wholly owned governmental agency with wide powers, and since its creation it has conducted financial operations on a wide scale. By express Congressional mandate, it has power to sue and be sued in any court of competent jurisdiction. But when acting as a litigant in a court of competent jurisdiction, it is not clothed with the prerogatives or immunity of the sovereign. *Keifer & Keifer* v. *RFC,* 306 U.S. 381; *RFC* v. *J. G. Menihan Corp.,* 312 U.S. 81."

Only the decision of this Court can reconcile the conflicts which have arisen.

CONCLUSION

The question presented by this case is one of great importance in the law applicable to government corporations. The issue has never been decided by this Court and there is a division of opinion among lower courts. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Tit. 15 U.S.C. Sec. 603:

". . . It shall have power to adopt, alter, and use a corporate seal; to make contracts; to lease or purchase such real estate as may be necessary for the transaction of its business; to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of the business of the Corporation, in accordance with laws, applicable to the Corporation, as in effect on June 30, 1947, and as thereafter amended; and to prescribe, amend, and repeal, by its board of directors, bylaws, rules, and regulations governing the manner in which its general business may be conducted . . . The Corporation shall be entitled to and granted the same immunities and exemptions from the payment of costs, charges, and fees as are granted to the United States pursuant to the provisions of law codified in sections 551, 604, 751, 1913, 1914, and 1923 of Title 28. The Corporation shall also be entitled to the use of the United States mails in the same manner as the executive departments of the Government. Debts due the Corporation, whether heretofore or hereafter arising, shall not be entitled to the priority available to the United States pursuant to section 191 of Title 31 except that the Corporation shall be entitled to such priority with respect to debts arising from any transaction pursuant to any of the following Acts or provisions in effect at any time: . . ."

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the United States District Court for the Northern District of Texas (R. 102), was entered without opinion. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 107–112) is reported at 209 F. 2d 145.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1954 (R. 113), and a petition for rehearing was denied March 8, 1954 (R. 139). The petition for a writ of certiorari was

filed June 3, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED

Whether a state statute of limitations may be applied against a claim of the United States because the public funds recovery of which was sought were disbursed by the Reconstruction Finance Corporation acting as agent for the United States under the Emergency Price Control Act.

STATUTE INVOLVED

The pertinent provisions of Section 2 (e) of the Emergency Price Control Act of 1942, 50 U. S. C. App. 902(e), are set forth in the Appendix, *infra,* pp. 12–13.

STATEMENT

In the course of economic stabilization during World War II, the ceiling prices of beef sold by slaughterers were reduced by the Price Administrator without a proportionate reduction in the prices of the livestock which the slaughterers purchased. To compensate the slaughterers for this differential, the Federal Loan Administrator instituted the Livestock Slaughter Subsidy Program under his authority (granted by the Emergency Price Control Act of 1942) to direct the payment of subsidies by corporations created under Section 5 (d) of the Reconstruction Finance Corporation Act, as amended, 55 Stat. 249, in such amounts and upon such terms and

conditions as he should determine to be necessary to obtain the required production of strategic or critical commodities. Section 2 (e), Emergency Price Control Act of 1942, 56 Stat. 23, 26, *infra*, pp. 12–13.[1] As the Livestock Slaughter Subsidy Program was an adjunct of price and distribution controls, the slaughterer had to comply with the regulations of the economic agencies of the Government in order to qualify for the subsidies. Because a great number of subsidy claims were made each month, it was not possible to check the validity of all claims immediately and at the same time pay them with the promptness necessary to enable the slaughterers to continue operations. As a result, the slaughterer was permitted to certify that his claim was accurate and that he had not willfully violated any regulation of the Office of Price Administration or the War Food Administration during the monthly reporting period covered by the claim. The Defense Supplies Corporation (DSC) was then authorized to approve these claims preliminarily, and to pay the subsidies.[2] If a claim was later found defective or if it was determined that the applicant had "wilfully violated any regulation * * *

[1] The history of this program is set forth in *Illinois Packing Company* v. *Reconstruction Finance Corporation*, 147 F. 2d 554 (Em. Ct. App., 1944).

[2] Defense Supplies Corporation, a subsidiary of Reconstruction Finance Corporation, was dissolved in 1945, by a joint resolution which transferred its subsidy administration functions to RFC. 59 Stat. 310.

applicable to the purchase or sale of livestock or to livestock slaughter, or to the sale or distribution of meat", DSC could declare those claims invalid and require restitution of the subsidy (D. S. C. Reg. No. 3, Sec. 10 (a), R. Ex. A, p. 8; Revised Reg. No. 3, Sec. 7003.10 (a), R. Ex. B, p. 9).

This action was brought by the United States to recover subsidies paid to the petitioner during the period from June 1, 1943 to June 30, 1946. The complaint (R. 1–5) alleged that the petitioner had not been entitled to these payments because he had sold beef above ceiling prices in each of the monthly periods for which he had filed a claim. The prayer asked for the damages, penalties, and forfeitures provided by the False Claims Act, 31 U. S. C. 231–235, and alternatively prayed for restitution of the sums paid to the petitioner. A motion to dismiss (R. 95) was made on the grounds that conditions necessary to the invalidation of subsidy claims had not been met by the Government, and that the action had not been brought within the time allowed by applicable statutes of limitations. The District Court granted the motion without stating its reasons (R. 102).

The Court of Appeals reversed (R. 107–112), finding causes of action stated under the False Claims Act, the Emergency Price Control Act, and for common-law fraud. Although it ruled the False Claims Act claim barred by the six year limitation period set forth in 31 U. S. C. 235—a

ruling which the Government has not sought to have reviewed—the Court of Appeals held that no statute of limitations applied to either of the other claims. The petitioner seeks a writ of certiorari in this Court on the ground that the two year Texas statute of limitations is applicable.

ARGUMENT

1. The claims of a wholly-owned Government corporation are claims of the United States, and suit upon such claims may be, and has often been, brought in the name of the United States. *Cherry Cotton Mills, Inc.* v. *United States,* 327 U. S. 536; *New Brunswick* v. *United States,* 276 U. S. 547; *Erickson* v. *United States,* 264 U. S. 246; *Clallam County* v. *United States,* 263 U. S. 341; *United States* v. *Lindsay,* 346 U. S. 568; see also *Defense Supplies Corporation* v. *United States Lines Co.,* 148 F. 2d 311 (C. A. 2), certiorari denied, 326 U. S. 746, and the lower court cases cited at 148 F. 2d at 312, fn. 3; *Insurance Co. of North America* v. *United States,* 159 F. 2d 699, 702 (C. A. 4).[3] For it is now established that—at least when Government monies are involved and the corporation is acting as the Government's agent—the United States is the real

[3] It is a common practice to enforce the Government's claims in the name of the United States itself, whatever the name or powers of the particular agency involved. See *United States* v. *Allied Corp.*, 341 U. S. 1, 5; *United States* v. *Remund*, 330 U. S. 539, 542–543; *United States* v. *Summerlin*, 310 U. S. 414.

party in interest and the loss is the Government's loss. *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524; *Emergency Fleet Corporation* v. *Western Union Telegraph Co.*, 275 U. S. 415, 424; *Southern Pacific Co.* v. *Reconstruction Finance Corp.*, 161 F. 2d 56, 59 (C. A. 9); and the cases cited above.[4]

It is a necessary corollary of these principles that no state statute of limitations can restrict the enforcement of such rights of a Government corporation, since these statutes are inapplicable to claims of the United States (*United States* v. *Thompson*, 98 U. S. 486; *United States* v. *Nashville, C. & St. L. Ry.*, 118 U. S. 120, 125, 126; *Board of Commissioners* v. *United States*, 308 U. S. 343, 351).[5] This is, in effect, the precise

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[4] This Court has continuously rejected efforts to differentiate between "governmental" and "commercial" activities of corporations created by the United States. See e. g., *Federal Land Bank of St. Paul* v. *Bismarck Lumber Company*, 314 U. S. 95, 102: "* * * when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental."

Even if this distinction, which many courts have sought to draw, had any valadity, there can be no question that a Government corporation paying subsides as a part of the wartime program of economic controls is acting in a "governmental" capacity. Cf. *United States* v. *Allied Corp.*, 341 U. S. 1, 5.

[5] Cf. *Tennessee Valley Authority* v. *Kinzer*, 142 F. 2d 833, 837 (C. A. 6); *Posey* v. *Tennessee Valley Authority*, 93 F. 2d 726, 727 (C. A. 5): "Notwithstanding the corporate entity and its subjection to suit, the Authority is plainly a governmental agency of the United States, and except as Congress may otherwise consent, is free from state regulation or control."

holding of *United States* v. *Summerlin*, 310 U. S. 414. There, the Federal Housing Administrator had become the assignee of a defaulted note. This Court held that he had acted "on behalf of the United States," and that "the fact that the claim was acquired by the United States through operations under the National Housing Act does not take the case out of [the] rule" that the Government is immune from state statutes of limitations. While the Federal Housing Administration did not have corporate status, it was subject to suit, 49 Stat. 722, and the rationale of the *Summerlin* opinion exactly fits the instant case in which claims similarly accrued to the Government through an agent acting "on its behalf."[6] The financial procedures in each case further indicate their basic similarity. The funds of the Federal Housing Administration were supplied by the Reconstruction Finance Corporation, 48 Stat. 1246. The payment of meat subsidies by the Defense Supplies Corporation could begin only after an order of the Federal Loan Administrator. See Section 2 (e) of the Emergency Price

[6] Indeed, if there were any validity to the petitioner's contention that "the assurance of this Court should be given the businessman that, many years after concluding a transaction with what he believes is an ordinary business entity like himself, he will not be confronted with an awesome sovereign against whom, for reasons buried in history, he may not assert a time bar" (Pet. 11), it would have been even more pertinent in *Summerlin*. See the opinion of the Supreme Court of Florida in that case, 140 Fla. 475, 191 So. 842.

Control Act, *infra,* p. 13.[7] That in the one case the funds were disbursed directly through an executive agency and in the other by the government corporation itself, at the direction of the agency, should not suffice to create an inference of Congressional purpose to subject one group of payments to state law, while retaining full immunity for the other.

The subsidy program was an integral part of the maximum price system established for World War II by the Emergency Price Control Act of 1942. With the approval of this Court, the remaining enforcement of the other parts of that system is being carried on in the name of the United States and with its freedom from state restrictions. *United States* v. *Allied Corp.,* 341 U. S. 1, 5. There is no room in the statute or in the history of wartime controls to create an exception for this significant portion of the control system by subjecting subsidy enforcement, at this date, to the diverse statutes of the several states.

2. The decisions which the petitioner cites in his attempt to show a conflict in principle between the opinion below and the law as stated by this Court are inapposite. *Keifer & Keifer* v. *Reconstruction Finance Corporation,* 306 U. S. 381, simply held the Regional Agricultural Credit Cor-

[7] Petitioner's statements at p. 8 that the Price Control Act "delegated *exclusive* authority to RFC" and that "Congress determined that RFC alone should administer the program," go beyond the statutes, since the law provided only that the payments must be made by the corporation.

poration liable to suit although its statute and charter were silent in this respect. *Federal Housing Administration* v. *Burr,* 309 U. S. 242, ruled that the agency's vulnerability to suit laid it open to garnishment proceedings. *Reconstruction Finance Corporation* v. *J. G. Menihan Corporation,* 312 U. S. 81, held the Corporation liable for costs in an action brought against it. The words of the *Burr* opinion concisely summarize the rationale of all three cases (309 U. S. at 245):

> * * * if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to "sue or be sued", that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.
>
> Clearly the words "sue and be sued" in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings.

Thus, when Congress provides that a governmental instrumentality shall be subject to suit, it contemplates that the agency shall be liable not only to service and judgment but also to those judicial sanctions and procedures which ordinarily are incident to legal proceedings. But such consent does not imply any change in the law to be applied. This was clearly recognized by the Court when, less than a year after the *Burr* decision, it refused in the *Summerlin* case (as shown above) to apply a state statute of limitations to a claim of the Federal Housing Administration, a suable agency. The decisions of this Court have never supported the assertion that unless Congress affirmatively endows a corporation with the substantive immunities of the Government, it will be presumed that they are waived. On the contrary, the consistent position of the Court has been that these corporations are agents of the Federal Government and that "the true nature of these modern devices for carrying out governmental functions is recognized * * * when realities become decisive." *Inland Waterways Corporation* v. *Young,* 309 U. S. 517, 524.[8]

[8] See, for example, *McCulloch* v. *Maryland*, 4 Wheat. 316; *United States Grain Corporation* v. *Phillips*, 261 U. S. 106; *Emergency Fleet Corporation* v. *Western Union*, 275 U. S. 415; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477 ("When the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the govern-

The same principle was followed by the Third Circuit in a decision which the petitioner has cited (Pet. 13–14) as in conflict with the instant case. In *Riverview Packing Co.* v. *Reconstruction Finance Corporation,* 207 F. 2d 361, 370, that court held a suit maintainable against the Reconstruction Finance Corporation for subsidy payments, but denied any interest, saying:

> The defendant Reconstruction Finance Corporation does not stand in judgment in this case as a private corporation but rather as a paying agent for the Government of the United States charged with the responsibility of disbursing public funds to carry out a Government program, the payment of livestock slaughter subsidies. No provision of the subsidy regulations nor any statute or other Government regulation authorizes the payment of interest upon deferred subsidy claims. In the absence of such authority the district court was without power to impose interest upon the United States either directly or by judgment against its paying agent.

3. Even if the Texas statute of limitations might be applied to the claim based on common-law fraud, that statute is clearly inapplicable to the claim arising under the Emergency Price Control Act. That Act placed no limitation upon subsidy

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ment itself through its departments"); *Clallam County* v. *United States*, 263 U. S. 341; *New Brunswick* v. *United States*, 276 U. S. 547.

actions such as this, and the Emergency Court of Appeals has held that it contemplated that no limitation would obtain on the claim of a slaughterer for the payment of subsidies. *Taylor & Richards, Inc.* v. *Reconstruction Finance Corporation,* 193 F. 2d 877, 878–879. It is not conceivable that Congress would permit an indefinite time to the private claimant, and yet waive its own immunity and subject the claims of the Government to the statutes of limitations of the various states.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1954.

APPENDIX

The pertinent provisions of Section 2 (e) of the Emergency Price Control Act of 1942, 56 Stat: 23, 26, 50 U. S. C. App. 902 (e), are as follows:

> Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided,* That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such sec-

tion 5d; except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which is applicable to such commodity at the time of sale or delivery, but such sale price may be below such maximum price or below the purchase price of such commodity, and the Administrator may make recommendations with respect to the buying or selling, or storage or use, of any such commodity. * * *

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In the Supreme Court of the United States

OCTOBER TERM 1954

No. 108

AARON BORIN, D/B/A WICHITA PACKING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA.

Brief of Western States Meat Packers Association, Inc., as Amicus Curiae in Support of Petition for Writ of Certiorari.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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Pursuant to Rule 42, consent to this brief has been obtained from the Solicitor General and from petitioner.[1]

THE INTEREST OF AMICUS CURIAE

Western States Meat Packers Association, Inc. is an association of 441 independent meat packers, chiefly in the nine western states. Its interest in the questions involved is the interest of its members, and their deep concern illustrates the importance of the questions

[1]Copies of the consents are attached as Appendix II.

and the need for resolution by this Court. Petitioner is not a member of the Association, but the suit against him forebodes similar suits against other packers. One complaint for several million dollars has already been filed against a member, *United States of America v. Union Packing Company,* No. 16729 (S.D. Cal.).

This suit seeks to recover from petitioner the amount of beef-slaughter "subsidies" paid him during World War II. To be eligible for payments a packer had to conform to the various OPA regulations and had to certify that he had done so. The basis of the suit is that the packer violated OPA regulations and therefore improperly applied for and received the payments.

These subsidies were not gratuities but an adjustment of inequities produced under the Emergency Price Control Act of 1942 by the imposition of low ceilings on meat products sold by the packer while the cattle raiser was allowed to charge the packer high prices for livestock in order to encourage livestock production.[2]

In this subsidy program about 26,000 subsidy claimants received payments.

Authorized Destruction of War-Time Records

Defense against a charge of violation would require reference to the voluminous records of the war years. Wartime price controls ended June 30, 1947. The Emergency Price Control Act of 1942 and the regulations issued thereunder required the packers to keep records, *Riverview Packing Co. v. Reconstruction Finance Corporation,* 207 F.2d 361, 365 (3 Cir.). On October 23, 1946, the Price Administrator issued Supplemental Order No. 189 requiring these records to be preserved (11 F.R. 12568). This order has been amended seven times.[3] Amendment No. 3 is-

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[2] *Armour & Co. v. Reconstruction Finance Corporation,* 162 F.2d 918, 922 (Em. Ct. App.); *Riverview Packing Co. v. Reconstruction Finance Corporation,* 207 F.2d 361, 367 (3 Cir.).

[3] 11 F.R. 13442, 12 F.R. 7327, 13 F.R. 1262, 14 F.R. 3707, 17 F.R. 18, 18 F.R. 33, 18 F.R. 8698.

sued February 20, 1948 required preservation of records by "all persons who have received any subsidy payment" (13 F.R. 1262). But amendment No. 5 of December 27, 1951 (17 F.R. 18) *authorized the destruction of the records.*[4] This was signed by the Secretary of Agriculture, the Chairman of the R.F.C., and the Acting Director of the Division of Liquidation of the Department of Commerce, and was approved by the Attorney General. To institute suits after authorizing the destruction of the old records almost savors of an entrapment and is incompatible with the rules of repose.

As said in *Guaranty Trust Co. v. United States,* 304 U.S. 126, where this Court was dealing with a claim of sovereign immunity from the Statute of Limitations,

> "The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time. It has long been regarded by this Court * * * as a meritorious defense, in itself serving a public interest." (p. 136)

The problem is not restricted to beef slaughtering subsidies. Other subsidies were paid to equalize the burden of price control; e.g., subsidies to coffee importers who had to pay uncontrolled prices abroad but whose sales prices in this country were regulated. Suits to recover coffee subsidies have been brought, and the application of the statute of limitations has been raised, *Reconstruction Finance Corporation v. McCarthy Bros.,* 117 F. Supp. 345 (D.C. Cal.). Other such suits are threatened.

The court below holds that no statute of limitations can be interposed to these suits. If so, anyone who accepted a subsidy during the war—nay, had to accept a subsidy in order to continue in business—took upon himself the burden of future harassment for time without end.

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[4]It required preservation only by parties to litigation then pending under the Act, by those who then had subsidy payments still withheld, by those on whom demand for repayment had been made, and by those to whom a notice to preserve the records should be mailed prior to March 1, 1952.

QUESTIONS PRESENTED AND REASONS FOR THIS BRIEF

1. The petitioner Borin has presented one question, viz.:

> "May the defense of a state statute of limitations be asserted in an action brought in the name of the United States of America for the recovery of subsidy payments made by the Reconstruction Finance Corporation in administering that program?"

We believe that something may be usefully added to petitioner's discussion; for example, the existence of a conflict with the Seventh Circuit and possibly with the Ninth.

2. There is another question which we feel should be presented, and which we therefore call to the Court's attention pursuant to Rule 42(3), viz.:

> Where an action could be maintained by the United States under the False Claims Act except for the bar of the statute of limitations therein contained, may that bar be eluded by casting the claim for relief in the form of a common law action for restitution of moneys improperly obtained or of a common law action for fraud?

STATUTES INVOLVED

The False Claims Act (R.S. 3490-3494, as amended, 57 Stat. 608, 31 U.S.C. Sec. 231-235) is involved in addition to the statutes quoted in the petition and brief in opposition. Section 7 (31 U.S.C., Sec. 235) provides:

> "Every such suit shall be commenced within six years from the commission of the act, and not afterward."

Other portions of this Act are quoted in Appendix I.

DISCUSSION

We present the second question first, for if we are correct as to it, the other question need not be reached.

I.

The Action Is Barred by the Statute of Limitations Contained in the False Claims Act.

The False Claims Act gives the Government a right to recover all moneys obtained from it by any species of fraud, falsehood, deceit or fiction. Prior to its enactment the Government doubtless could have utilized, in some circumstances, either a common-law action for fraud or some other form of common-law action for restitution. The False Claims Act is more comprehensive than these. Any claim theretofore maintainable can be maintained under the Act, and in addition it subjects the offender to double damages and other sanctions. While it gives informers the right to institute actions, it is not confined to *qui tam* suits.

And it imposes a 6-year statute of limitations.

It has been argued in the past that the purpose of the Act was penal. But this Court has reviewed the statute and held that its purpose was not to create a penal liability but to provide the United States with a more effective means of recovering money improperly taken from it. *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 551.

No reason can be imagined why the Government should ever wish to proceed under the common law rather than under this statute except to escape the 6-year bar. The simple question therefore is this:

When Congress has enacted a comprehensive statute regulating a given field, when it has "occupied that field" and has seen fit to include a statute of limitations, may the statute be ignored as merely cumulative and resort be had to prior remedies in order to escape that bar?

The court below holds that it may, relying on *Pooler v. United States,* 127 Fed. 519 (1 Cir. 1904) and a dictum in *United States v. Silliman,* 167 F.2d 607, 611 (3 Cir.).[5] But the reasoning of the

[5]In the *Silliman* case a judgment in favor of the United States was reversed on other grounds, so that the issue was not available for presentation to this Court.

Pooler case has long since been shown to be unsound. Its reasoning was that the "remedy given [by the False Claims Act] is strictly penal, and not only so, but *qui tam.*" The first branch of this reasoning was rejected by this Court in *United States ex rel. Marcus v. Hess,* supra. The second is not only untrue under the present text of the statute, but the Court below has recognized it to be untrue by holding in this case that the 6-year bar applies to a suit under the Act instituted by the Government itself.[6]

The *Silliman* dictum is based on the view that a statute giving a cumulative remedy does not abrogate a prior common law remedy. But where a statute providing a comprehensive remedy fully covers the subject matter with which it deals, it carries with it an implication that pre-existing remedies are precluded or totally incorporated in the new system. *Bindczyck v. Finucane,* 342 U.S. 76; *United States v. Klein,* 153 F.2d 55 (8 Cir.); *Jackson v. Cravens,* 238 Fed. 117 (5 Cir.); *Hassel et al. v. United States,* 34 Fed. 2d 34 (3 Cir.). The principle is summed up in *Jackson v. Cravens,* supra:

> "We think the contention of appellants also conflicts with the rule of construction that where a statute provides a new, specific and complete remedy, and fully covers the subject-matter, the provisions of the statute will be looked to alone and resort will not be had to prior existing general remedies as cumulative." (p. 120)

In truth the real question is not whether the former common law remedies are still available; they merely gave the government single damages, and if it chooses to pray for single damages under the False Claims statute, it is free to do so. The real question is one of Congressional intention: Did it mean to prescribe a time limitation for such suits? The legislative history of the False Claims Act shows that Congress had before it the two opposed social considerations that must always arise in deciding whether claims of the government should be subject to limitations:—on the one hand,

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[6]The Government contended that the 6-year bar applied only to suits brought by informers.

that when moneys have been improperly obtained from the government, there should be no limitation of time upon recovery; on the other, that evidence vanishes with time and even the government should be held to some diligence. These conflicting social policies were presented to Congress and were reconciled by enactment of a 6-year bar.

The following occurred in the Senate (Congressional Globe, 37th Congress, 3rd Session, p. 958):

> "Mr. Howe: I will inquire of the Senator from Michigan if he would have any objection to striking out 'three,' and inserting 'six,' in the eighth section; so that it will read:
>
> That every such suit shall be commenced within six years from the doing or committing the act, and not afterwards.
>
> Mr. Howard: Not the slightest.
>
> Mr. Grimes: You ought to make it a longer period.
>
> Mr. Howe: I will move to amend that section by striking out 'three' and inserting 'six.'
>
> Mr. Grimes: I suggest to the Senator from Wisconsin to enlarge the term of the limitation to ten years. If a man swindles the Government in times like these, *there ought never to be any limitation;* and no matter when the development may be made, no matter when it shall be discovered that he has been guilty of perpetrating fraud on the Government, the Government ought to have the privilege of coming to him, or his estate and his heirs, and recovering money of which he has defrauded it. I trust the Senator will accept my proposition, to make it ten years in place of six.
>
> Mr. Howe: I have no personal objection to the limitation proposed by the Senator from Iowa; but when I rose to propose the amendment I saw that there was a difference of opinion, some suggesting one term and some another; and I thought perhaps six years would meet with the views of the Senate, and perhaps ten would not. *There is some weight, I think, to be given to this consideration, that the Government ought to be held to some little diligence in prosecuting these men. Besides, we cannot shut our eyes to the fact that in the lapse of ten years or a longer period testimony is likely to be lost; the memory is likely to be obscured as to the facts of a transaction; and an investigation prosecuted at that distance of time would be attended with trouble and hazard.* I should

not oppose a proposition to insert ten years; but I think, pe haps, six years will be enough.

The Presiding Officer: The question is on amending th eighth section by striking out 'three' and inserting 'six'.

The amendment was agreed to.

The bill was ordered to be engrossed for a third readin was read the third time, and passed." (Italics added.)

When Congress chose to impose a 6 year statute of limitatio on false claim suits, we think it inconceivable that it intended t permit the government to be free of any limitations by confinin its prayer to single damages. To so conclude is to ignore the ra tionale of this subject as stated in *Guaranty Trust Co. of New Yor v. United States,* 304 U.S. 126: While the rule *quod nullu tempus occurrit regi* is a vestigial remnant of a prerogative o the Crown, its only justification for survival must be found i considerations of public policy to preserve public rights against th neglect of public agents. But that social policy conflicts with th strong social policy favoring repose. Consequently, as this Cou said in the *Guaranty* case, supra:

> "those rules which must be assumed to be founded on prin ciples of justice applicable to individuals, are to be relaxe only in response to some persuasive demand of public polic generated by the nature of the suitor or of the claim which i asserts. That this is the guiding principle sufficiently appear in the many instances in which courts have narrowly re stricted the application of the rule *nullum tempus* in the cas of the domestic sovereign." (p. 135)

Where Congress has not reconciled these conflicting social pol icies, this Court must do so as best it can. But where Congress has considered and reconciled them, its resolution should be given the fullest effect; and a Congressional decision in favor of ele mentary notions of justice should not be whittled away by clever pleading.

THE BAR OF THE STATUTE MAY NOT BE EVADED BY RESORT TO THE COMMON LAW FICTION OF WAIVING THE TORT AND SUING IN ASSUMPSIT.

The court below not only held that the government could maintain this action as a common-law fraud action but that it could maintain it as a suit for restitution of subsidies under authority of the Emergency Price Control Act of 1942 and implementing directives. But that Act made no provision for recovery of payments made on invalid claims.[7] And the directive (Sec. 7003.9, Defense Supplies Corporation Reg. No. 3) merely negatived the idea that payment of a claim would constitute an account stated. While a cause of action for recovery of payments made on invalid claims may exist, the theory, apart from fraud, must be that of a contract implied in law. In traditional legal language, this "waives the tort, and sues in assumpsit".

The fiction of "waiving the tort and suing in assumpsit" arose historically for certain procedural reasons. It cannot enlarge a right and avoid a bar imposed by Congressional enactment. In *Loughman v. Town of Pelham,* 126 F.2d 714 (2 Cir.) the court endorsed and applied the conclusion on this subject of Professor Corbin in "Waiver of Tort—Suit in Assumpsit", 19 Yale Law Journal 221, that the statute of limitations applicable to the tort should not be thus avoided. As Professor Corbin states:

> "* * * The fiction should not be used to enlarge a right. The fact that it has been used to dodge the rule that a personal action dies with the person, or to expand the right of set-off which the common law technically and inconveniently limited is no ground for using it to nullify a legislative act based on sound public policy * * * in the cases here con-

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[7]The cases cited in the opinion below as pertinent were not suits by the United States to recapture subsidy payments but were suits against the Reconstruction Finance Corporation to collect subsidies. *United Meat Co. v. Reconstruction Finance Corporation,* 174 F.2d 528 (D.C. Cir.); *San Antonio Packing Co. v. Reconstruction Finance Corporation,* 182 F.2d 614 (Em. Ct. App.); *Taylor & Richards v. Reconstruction Finance Corporation,* 193 F.2d 877 (Em. Ct. App.).

sidered there is a recognized tort, it is the real cause of action, and the tort limitation should control." (p. 236).[8]

II.

If Not Barred by the Statute of Limitations in the False Claims Act, the Suit Should Be Subject to the Applicable State Statute.

This suit has been filed *sub nom.* the United States as plaintiff, although the moneys were paid out by corporations, the Defense Supplies Corporation and the Reconstruction Finance Corporation,[9] and although similar suits have been filed in the name of the R.F.C. Doubtless the purpose of suing in the name of the United States was to try to take advantage of privileges and immunities thought to be available to the sovereign.

The petition does not present the question whether the United States is a proper plaintiff.[10] But assuming that it is, freedom from

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[8]For a similar conclusion, see *Hart v. E. P. Dutton & Co.,* 93 N.Y.S. 2d 871; *O'Connell v. Chicago Park Dist.,* 376 Ill. 550, 34 N.E. 2d 836; *Schmidt v. Merchants Despatch Transportation Co.,* 270 N.Y. 287, 200 N.E. 824.

[9]As said in *Riverview Packing Company v. Reconstruction Finance Corporation,* 207 F.2d 361 (3 Cir.):

> "here Congress by section 2(e) of the Emergency Price Control Act expressly provided that the subsidy payments should be paid only by corporations created or organized pursuant to section 5d of the Reconstruction Finance Corporation Act, 15 U.S.C.A. § 609j, as determined by the Federal Loan Administrator. Pursuant to that authority the Federal Loan Administrator designated Defense Supplies Corporation to carry out the meat subsidy program. That corporation had been incorporated under section 5d of the Reconstruction Finance Corporation Act in 1940. * * * By the Act of June 30, 1945, 59 Stat. 310, 15 U.S.C.A. § 611 note, Defense Supplies Corporation was dissolved and its functions, powers and duties were transferred to the defendant * * *
>
> "* * * By section 2(e) Congress directed that subsidies should not be paid by Government officers, to whom immunity would apply, but exclusively by certain Government corporations * * *." (pp. 366, 367)

[10]The citations, in the government's brief in opposition, of decisions of this Court as support for the statement that the suit can be brought in the name of the United States are disingenuous. *Cherry Cotton Mills, Inc. v. United States,* 327 U.S. 536 involved the right of the United States to set

the statute of limitations is no different than if suit were brought in the name of the R.F.C.; if the latter would be barred, the United States is barred. *Guaranty Trust Co. v. United States,* 304 U.S. 126, 141, 142. As the Court took pains to state in *Cherry Cotton Mills v. United States,* 327 U.S. 536, a holding that a claim of a corporate agency can be presented in the name of the United States does not mean that it possesses sovereign immunities.

This Court has never decided whether a corporation like the R.F.C. is subject to state statutes of limitations, and this is certainly "an important question of federal law which has not been, but should be, settled by this Court." Rule 19b.

The lower federal courts are in direct conflict with each other.

Of the Courts of Appeals, only the Fifth Circuit (in this case) has held that the R.F.C. is not subject to the statute. The Seventh Circuit, in *Dorsey v. Reconstruction Finance Corporation,* 197 F.2d 468, has held that it is.[11] The Ninth Circuit in *Lawrence Warehouse Co. v. Defense Supplies Corporation,* 168 F.2d 199 has evinced belief to the same effect.[12]

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up as a counterclaim moneys due the R.F.C. when sued directly. *New Brunswick v. United States,* 276 U.S. 547, *Erickson v. United States,* 264 U.S. 246, and *Clallam County v. United States,* 263 U.S. 341 were suits where the corporation was a party plaintiff, the United States being joined as a party. The statute involved in *United States v. Lindsay,* 346 U.S. 568 permitted the United States to sue and specified that by doing so it should have no exemptions or immunities not possessed by the Commodity Credit Corporation. 15 U.S.C. Sec. 714b.

United States v. Allied Corp., 341 U.S. 1, *United States v. Remund,* 330 U.S. 539, and *United States v. Summerlin,* 310 U.S. 414 did not involve corporations but claims of the United States possessed by regular agencies in the executive branch. See discussion infra this brief.

[11]In the *Dorsey* case, the District Court, after holding the R.F.C. subject to the statute, decided in its favor on the ground that the statute had been avoided under the state law by an account stated (101 F. Supp. 197). The Seventh Circuit affirmed on the basis that the Illinois statute did not preclude application of collateral but held, "It is true that the statute of limitations had run on this note before this action was commenced."

[12]In that case the court vacated a judgment in favor of Defense Supplies Corporation entered after its statutory demise on the ground that the action abated because the R.F.C. was not substituted as plaintiff within the proper

In the District Courts, *Dorsey v. Reconstruction Finance Corporation,* 101 F. Supp. 197 (N.D. Ill.) and *Reconstruction Finance Corporation v. Foster-Wheeler Corporation,* 70 F. Supp. 420 (D.C. Tex.) hold that the R.F.C. is subject to state statutes of limitations, on the reasoning of *Reconstruction Finance Corporation v. Menihan Corp.,* 312 U.S. 81.[13] *Reconstruction Finance Corporation v. McCarthy,* 117 F. Supp. 345 (N.D. Cal.) (rejecting the *Foster-Wheeler* case), *Reconstruction Finance Corporation v. Marcum,* 100 F. Supp. 953 (W.D. Mo.) and *United States v. New York Dock Co.,* 100 F. Supp. 303 (S.D. N.Y.) hold to the contrary.

The court below rested on *United States v. Summerlin,* 310 U.S. 414, and the brief of the Solicitor General in opposition contends that the *Summerlin* case is a direct holding in point. But that case did not involve a suit by or through a government corporation. It was a suit by the government on a claim possessed by it through the Federal Housing Administrator, an officer in the Executive Branch of the government. That a government corporation is an agency of the government does not alter the fact that it is still a private corporation, "an entity distinct from the United States and from any of its departments or boards." *Skinner and Eddy Corporation v. McCarl,* 275 U.S. 1, 5, 11. Thus in *United States v. Remund,* 330 U.S. 539, the Court emphasized that the agency there involved, the Farm Credit Administration,

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time, and that claims of Defense Supplies Corporation had been transferred by statute to the R.F.C. Said the Court:

> "* * * after the twelve months it could have begun a new suit against appellants. That it now may have lost that right to sue by some statute of limitation is no more relevant here than it would have been to the holding in the Fix case." (p. 205)

This Court reversed, *Defense Supplies Corporation v. Lawrence Warehouse Company,* 336 U.S. 631 on the ground that the action did not abate and did not touch on the limitations question.

[13]In accord: *Home Owners Loan Corporation v. Williams,* 168 S.W. 2d 325 (Tex. Civ. App.).

> "bears none of the features of a government corporation with a legal entity separate from that of the United States." (p. 541)

and that

> "At no time has [it] been other than an unincorporated agency of the United States Government * * *. In short, it is an integral part of the governmental mechanism." (p. 542).

Moreover, it is a demonstrable fact that Congress did not believe that the *Summerlin* case decided that government corporations are immune from state statutes of limitations. The *Summerlin* case was decided in 1940. When The Commodity Credit Corporation Charter Act was enacted in 1948 (62 Stat. 1070), the Senate Bill provided that the corporation should have various immunities of the United States, including immunity from state statutes of limitations. The Senate Report (S.R. No. 1022, March 24, 1948) explained:[14]

> "Subsection (e) provides that the Corporation shall have the rights, privileges, and immunities of the United States and may assert them in any suit, action, or proceeding. * * * The section enumerates, but not by way of limitation, certain of the rights, priorities, and immunities of the United States which would, by virtue of this section, be enjoyed by the Corporation. The enumerated limitations are, generally speaking, those which, by decision of the Supreme Court, are not presently enjoyed by the corporation, for example immunity from imposition of court costs, fees, and charges, and exemption from allowance of interest on claims and judgments; *and those as to which the question of applicability has not been determined by the Supreme Court, such as the applicability of State and local statutes of limitations to Government corporations.*" (Italics added)

The House amendment contained no such provision for immunity from statutes of limitations. In Conference a 4-year

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[14]2 U.S. Code Congressional Service, 80th Congress, 2d Sess. 1948, pp. 2138, 2149.

statute was provided as a compromise between complete immunity and subjection to state statutes.[15]

This history of The Commodity Credit Corporation Charter Act may be contrasted with certain history of the Reconstruction Finance Corporation Act. Only 35 days before the enactment of The Commodity Credit Corporation Charter Act in 1948 Section 3 of the R.F.C. Act was amended to extend to the R.F.C. some but not all of the immunities and privileges of the United States, viz., exemption from court costs and priority for certain debts (62 Stat. 262, 15 U.S.C. 603). No exemption from the statute of limitations was stated. Yet at that time the only reported case on the subject was *United States v. Foster-Wheeler Corporation,* 70 F. Supp. 420, decided only the year before, which held that the R.F.C. was subject to the state statutes of limitations.

In at least one other act creating a government corporation Congress has shown its belief that statutes of limitations do apply. The Act of June 3, 1924, 43 Stat. 360, creating the Inland Water Ways Corporation, provided (Sec. 6(f)):

> "In determination of the running of the statute of limitations or any prescriptive right, the period of time shall be computed in the same manner as though this Act had not been passed."

For reasons of efficiency and other advantages the government often, in latter years, has seen fit to utilize corporations to conduct its affairs. When it does so, it should be held to have subjected them to the usual incidents of that form. Unless it manifests a different intention, it thereby exhibits an intention that the rules applicable to corporations and not to the sovereign apply. In

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[15]Conference Report No. 2444, June 19, 1948, 2 U.S. Code Congressional Service, 80th Congress, 2d Sess., pp. 2155, 2156:

> "The Senate bill provided that Commodity Credit Corporation shall have the immunities of the United States from State statutes of limitations. The House amendment did not contain such a provision. Under the conference substitute a 4-year statute of limitations will apply to suits brought by or against the Corporation."

In 1949 the 4-year statute was extended to 6 years, 63 Stat. 154, 156.

answering a variety of other questions this Court has so held. *Federal Land Bank v. Priddy,* 295 U.S. 229; *Keifer & Keifer v. Reconstruction Finance Corporation,* 306 U.S. 381; *Federal Housing Administration v. Burr,* 309 U.S. 242; *Reconstruction Finance Corporation v. Menihan Corp.,* 312 U.S. 81; *Sloan Shipyards v. U. S. Fleet Corporation,* 258 U.S. 549. These are the decisions to which the legislative history cited above refers.

United States v. Edgerton & Sons, 178 F.2d 763 (2 Cir.) summed up these cases by saying:

> "When the United States conducts business transactions through a corporation, the tendency of recent decisions is to hold that such corporation does not possess sovereign immunity unless expressly endowed with it." (p. 764)

As said in *Reconstruction Finance Corporation v. Breeding,* 211 F.2d 385, 390 (10 Cir.), "when acting as a litigant in a court of competent jurisdiction, it is not clothed with the prerogatives or immunity of the sovereign."

Although lower courts continue to speak of the rule *quod nullum tempus occurrit regi* as an aspect of the doctrine of sovereign immunity which shields the government from suit, this Court's decision in *Guaranty Trust Co. v. United States* 304 U.S. 126, shows that the rule is of lesser dignity. Since government corporations are not shielded by the doctrine of sovereign immunity from suit, *a fortiori* they do not have the government's exemption from the statute of limitations.

The *Guaranty Trust* case shows that if *nullum tempus* is to have justification in modern times, it must find it in some public policy strong enough to overcome the very strong public interest in repose. Therefore it has been narrowly restricted in its application. See, for example, the illustrations and this statement in footnote 3 in that decision:

> "The rule *nullum tempus* has never been extended to agencies or grantees of the local sovereign such as municipalities, county boards, school districts and the like. *Metropolitan R. Co. v. District of Columbia,* 132 U.S. 1; *Boone County v.*

Burlington & Missouri River R. Co., 139 U.S. 684, 693." (p. 135)

The basic theory of the rule is that, having many agents, the government should not be taxed with their delays. But this reasoning becomes hollow or loses force when applied to government corporations. Long after the rule *nullum tempus* developed large corporations grew up, and through them much of the economic life of the country is carried on. Yet no one would contend that the fact that a corporation must act through a multiplicity of agents should override the social interest in repose. The corporate form is a tighter structure and thought to be more controllable than the non-corporate. Correlatively, the agents' delays are justly chargeable to his corporate principal.[16]

The court below has sought to decide the question—to reconcile the conflict between the social interests in protecting government rights on the one hand and the social interest in repose and the social interest in holding the government to the same standards of conduct as its citizens on the other—by considering whether the government in a particular context is exercising a proprietary or a

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[16]Cf. the experience of the United Kingdom. Much of the Nationalization program is being effected through public corporations, and they are being subjected to the ordinary laws of the land. William A. Robson "British Public Corporations," 63 Har. Law Rev. 1321, 1338. *Tamlin v. Hannford*, [1950] 1 K.B. 18, held that the British Transport Commission did not have the immunities of the Crown, except where specifically provided. The Acts creating the National Coal Board [Coal Industry Nationalization Act, 1946, 9 & 10 Geo. 6, c. 59, Secs. 49(1) and (2)] and the Electricity Board [Electricity Act, 1947, 10 and 11 Geo. 6, c. 54, Sec. 12] provide that actions against them shall not be subject to the short statute of limitations applicable to actions against a public authority.

Cf. also Thurston, Government Proprietary Corporations, 21 Va. Law Rev. 465, 496:

> "The paramount authority of Congress to control its national corporations must be admitted, and generally it would seem desirable for Congress to prescribe as far as possible the rules governing its corporations rather than leave matters to the varying laws of the 48 states. But where Congress has not acted the state laws should generally be held to apply, and in view of the commercial nature of the corporations and their separate legal personality, the plea that they are instrumentalities of the national government ought not to be too readily listened to."

governmental function. We think this a delusive futility, for the federal government must justify whatever it does as an exercise of its power to govern. The brief of the Solicitor General in opposition agrees with this view (Brief, p. 6, fn. 4), and thus it abandons the reasoning of the court below.

The government must therefore be contending that statutes of limitations never apply to government corporations unless Congress expressly so provides. We think that the contrary is true, as a fair submission from legislative history reviewed above and this Court's decisions: Congress, in reconciling the several social interests, has recognized the greater justice of statutes of limitations and has believed that by adopting the corporate form it subjects claims to state statutes unless it provides express immunity or specifies its own time limits.

CONCLUSION

It is respectfully submitted that the Court should grant the writ, and should then hold plaintiff's claim subject to the statute of limitations of the False Claims Act, or, if not, to the applicable state statute.

Dated: San Francisco, California, July 12, 1954.

MOSES LASKY
Attorney for Western States Meat Packers Association, Inc.

BROBECK, PHLEGER & HARRISON
Of Counsel.

(APPENDICES FOLLOW)

APPENDIX I

False Claims Act

(R. S. 3490-3494, as amended, 57 Stat. 608, 31 U.S.C., Sec. 231 et seq.)

31 U.S.C. Sec. 231:

"Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, * * * shall forfeit and pay to the United States the

sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Sec. 232:

"(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. * * *"

Sec. 233:

"It shall be the duty of the several United States attorneys for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of $2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit."

APPENDIX II

OFFICE OF THE SOLICITOR GENERAL
Washington, D. C.

June 11, 1954

Moses Lasky, Esquire
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco 4, California

Re: No. 108 Aaron Borin d/b/a Wichita Packing Company v. United States

Dear Mr. Lasky:

In accordance with your request, I hereby consent to your filing a brief amicus curiae in the above-entitled case on behalf of Western States Meat Packers Association, Inc.

A copy of this letter is being sent to the Clerk of the Supreme Court.

Sincerely yours,

SIMON E. SOBELOFF
Solicitor General

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1953

No. .....

AARON BORIN, D/B/A WICHITA PACKING COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

CONSENT TO FILING OF BRIEF OF AMICUS CURIAE

Consent is hereby given to the filing by Western States Meat Packers Association, Inc. of a brief as amicus curiae in support of petition for writ of certiorari to be filed herein by Aaron Borin, dba Wichita Packing Company, to review the judgment of the United States Court of Appeals for the Fifth Circuit in the case of United States of America vs. Aaron Borin, dba Wichita Packing Company, No. 14534.

Dated: May 25, 1954.

HERMAN P. GREENBERG
Attorney for Aaron Borin, Petitioner

.....
Attorney for United States of America

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 108

AARON BORIN, D/B/A WICHITA PACKING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO THE BRIEF OF WESTERN STATES MEAT PACKERS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

On June 11, 1954, the Solicitor General consented to the filing of a brief *amicus curiae* by Western States Meat Packers Association, Inc., in support of the petition for a writ of certiorari in this case. That petition was directed solely to the question whether "the defense of a state statute of limitations" may "be asserted in an action brought in the name of the United States of America for the recovery of subsidy payments made by the Reconstruction Finance Corporation" (Pet. 2). It now appears that the brief *amicus*

curiae has directed itself additionally and principally to a separate question: Whether the six-year limitation in the False Claims Act, 31 U.S.C. 235, was intended by Congress to govern claims of the Government sounding in common-law fraud. This question was briefed and argued in the Court of Appeals, and was decided adversely to the petitioner. He has not sought review of this question in this Court. In these circumstances, we respectfully suggest that the question raised by the brief *amicus curiae* is not properly before this Court and should not be considered.

Rule 23(1)(c) of this Court provides that "only the questions set forth in the petition or fairly comprised therein will be considered by the court." See also Rule 40 (d) (2), forbidding briefs on the merits from raising additional questions not already presented in the petition. Specifically recognizing that the question it propounds is not comprised in the question set forth for review by the petition (Amicus Br. 4), the *amicus curiae* has suggested that authority for its interposition may be found in Rule 42(3) of this Court which provides that a motion for leave to file a brief *amicus curiae* when any party has not consented thereto shall "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case." Even if this rule has any application where the brief is filed with the consent of the parties, it seems clear that the brief must encompass only

issues comprised in the questions as stated by the petition. It cannot include issues completely outside these questions without in effect negating the restrictions of Rule 23 (1) (c).[1]

The brief *amicus curiae* was filed on July 15, 1954, more than ninety days after the final judgment of the Court of Appeals. At that date, it would have been beyond the authority of this Court to receive a petition from the losing party below. 28 U.S.C. 2101; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399. The expiration of this time period should also preclude any fundamental change by the petitioner in the issues which he has formulated and presented in his petition. See Rules 23(1)(c) and 40(d)(2). To permit an amicus curiae at this point to accomplish what the petitioner cannot would violate the purpose of the statute and sanction an unwarranted interference in the conduct of the suit by the parties.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

JULY, 1954.

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[1] Questions regarding the jurisdiction of this Court to decide the issues presented by the parties, for example whether the case is moot, may be regarded as an exception to this principle. But properly considered, the question of the power of the Court to decide questions brought before it is inherently comprised in those questions.

The statute of limitations, as applied to private persons, is of course a defense which may be waived, and does not affect the jurisdiction of the Court.

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In the Supreme Court of the United States

OCTOBER TERM 1954

No. 108

AARON BORIN, D/B/A WICHITA PACKING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA.

Reply Memorandum of Western States Meat Packers Association, Inc., as Amicus Curiae in Support of Petition for Writ of Certiorari.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

The Solicitor-General has filed a memorandum to contend that the question of the applicability of the 6-year limitation in the False Claims Act (31 U.S.C., Sec. 235) is not properly before the Court. But that question is *necessarily* involved in the petitioner's question whether the case is barred by a State statute of limitations.

To petitioner's question there are three possible answers: (1) "Yes", (2) "No, because no statute of limitations applies at all"; and (3) "No, because Congress has entered the field and prescribed its own period of limitations." The petitioner argues that the first is the correct answer; the Solicitor-General, the

second; and our *amicus* brief, the third, and, if not, then the first. The *amicus* brief does not present an issue alien to that raised by the petition, or, in the Solicitor-General's phrase, a "fundamental change"; while loosely referred to in the *amicus* brief as another question, it is but another answer to the same question.[1]

This Court's new Rule 23(1)(c) provides that "The statement of a question presented will be deemed to include every subsidiary question *fairly comprised therein.*" This is to be contrasted with the prescription of old Rule 38(2) that "only the questions *specifically* brought forward by the petition for writ of certiorari will be considered." Presumably, the rule was changed so as to do away with a practice of splitting hairs in a proliferation of "questions" stated, and to make clear that important questions will not be compressed into a Procrustean bed that denies full and well-rounded consideration. It would be unfortunate were this Court's new Rules, in the moment of their birth, to be given a grudging construction.

Our discussion of the False Claims Act falls within that portion of Rule 42(3) which provides for an *amicus* brief where it is believed that questions of law have not been adequately presented by the parties. Consequently, we merely note that Rule 42(3) also contemplates the use of *amicus* briefs to discuss "questions of law that have not been * * * presented by the parties" at all.[2]

The Solicitor-General's memorandum concludes with a suggestion of lack of jurisdiction to consider the issue of the False Claims Act because the *amicus* brief was filed over 90 days after the judgment below. This is answered by what we have said above.

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[1]Our amicus brief refrained from discussing other questions believed to be significant but which did not seem to be covered by the petition; e.g., *amicus* brief, p. 10, where we noted that "The petition does not present the question whether the United States is a proper plaintiff" and therefore discussed the case on the assumption that it was.

[2]Rule 42(3) states that a motion for leave to file an amicus brief shall "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties."

The adverb "adequately" appears solely in the parenthetical clause and does not limit the sentence outside the commas, which thus refers to "questions of law that have not been presented by the parties."

But it may be added that the timely filing of the petition for certiorari satisfied all jurisdictional requirements. It is settled, for example, that after denial of certiorari the Court may grant a petition for rehearing to consider entirely new questions.[3]

We sense a possible intimation in the Solicitor's memorandum that consent to our filing an *amicus* brief was given on an assumption that it would discuss the question as narrowly as does the petition. Our request was written to the Solicitor-General 9 days before the petition was served upon him, and referred to our client's interest in "the questions at issue, concerning the existence of a statute of limitations against suits brought to recover meat slaughtering subsidies paid during the period of price controls in the war period." To this, our brief confined itself.

Respectfully submitted,

MOSES LASKY
Attorney for Western States
Meat Packers Association, Inc.

BROBECK, PHLEGER & HARRISON
Of Counsel.

San Francisco, California,
July 29, 1954.

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[3]Cf. Stern & Gressman, Supreme Court Practice, (p. 330):
"Questions not presented in the original petitions are not foreclosed upon rehearing, even though the statutory period for filing a petition for certiorari may have expired in the meantime. *White v. Texas*, 309 U.S. 631, 310 U.S. 530. The Court's jurisdiction over the case is established by a timely petition for certiorari."